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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INTEL CORPORATION,

Plaintiff,

v.

FORTRESS INVESTMENT GROUP LLC,
FORTRESS CREDIT CO. LLC, UNILOC
2017 LLC, UNILOC USA, INC., UNILOC
LUXEMBOURG S.A.R.L., VLSI
TECHNOLOGY LLC, INVT SPE LLC,
INVENTERGY GLOBAL, INC., and IXI IP,
LLC,

Defendants.

Case No. 3:19-cv-07651-EMC

**DEFENDANTS' JOINT REPLY IN
SUPPORT OF JOINT MOTION TO
DISMISS AND TO STRIKE INTEL'S
SECOND AMENDED COMPLAINT**

Hon. Edward M. Chen

Date: September 16, 2021
Time: 1:30 p.m.
Dept.: Courtroom 5

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1 **I. INTRODUCTION**

2 Intel's Opposition brief (Dkt. 254, "Opp.") only serves to highlight the SAC's many
3 deficiencies. Instead of demonstrating that the Second Amended Complaint (Dkt. 236, "SAC")
4 cures any of the prior two complaints' failings, Intel (who is now the only plaintiff in this case, *see*
5 Dkt. 263) either (1) recycles allegations that this Court already held are deficient, or (2) argues that
6 the SAC need not allege facts that this Court has repeatedly held are necessary. It is thus apparent
7 that Intel has not only failed to state an antitrust claim but is also incapable of doing so. The Court
8 should dismiss the SAC with prejudice and grant Defendants' Motion to Dismiss (Dkt. 244,
9 "Mot.") for the following independent reasons.

10 The Markets. While Intel claims that it has "narrowed" the alleged markets "based on
11 specific functions" (Opp. at 2:16-17), this is illusory. Intel does not dispute that these "markets"
12 contain the exact same patents as before, and Intel still fails to explain how these patents are
13 plausibly interchangeable. For example, Intel alleges no facts showing that a patent on a
14 suffocation prevention system is an economic substitute for a patent on an exercise monitoring
15 system. Moreover, it is clear from the face of the patents that many of them do not even fit within
16 the SAC's new market descriptions. Intel tries to dismiss the discrepancy by arguing that it has
17 relabeled some patents as "complements," but, as the Motion demonstrated, including
18 "substitutes" and "complements" within the same market is economic nonsense. By including
19 complements, Intel is improperly trying to inflate the alleged number of patents owned by
20 Defendants in each market to support its flawed theory that Defendants have somehow aggregated
21 a "massive" patent portfolio. Intel's illogical markets however, fail as a matter of law.

22 Market Power. The SAC fails to cure any of the six deficiencies that the Court identified
23 regarding the FAC's "direct evidence" theory of market power, the "most fundamental[]" of which
24 was the FAC's failure to allege "how many other substitute patents are available" in each market
25 and whether Defendants' patents constitute the "crown jewels." Dkt. 230 ("2nd Order") at 25:12-
26 17. Intel does not even attempt to show that it has cured this defect. Instead, it argues that it does
27 not have to, despite this Court's clear ruling to the contrary. As to the other deficiencies, Intel
28 repeats the same arguments that this Court already rejected. For example, because the SAC still

1 has no allegations of actual royalty rates or settlement amounts, Intel again relies on the same
2 allegedly “supracompetitive” demands that this Court held have “limited[] probative value”
3 because they are “simply demands.” 2nd Order at 26:10-11. Intel also complains that facts
4 regarding royalties and settlements are within Defendants’ exclusive control even though the
5 Court has held that this excuse did not relieve Plaintiffs of their pleading burdens. *Id.* at 24:15-18.
6 In short, the Court has heard this all before, and Intel’s flawed arguments fare no better this time.

7 Antitrust Injury. The Opposition erroneously asserts that “[t]he Court already determined
8 that Plaintiffs’ allegations are sufficient to plead antitrust injury.” *Opp.* at 33:12-13 (citing Dkt.
9 190 (“1st Order”) at 20). The Court held the opposite. 1st Order at 21:2-6 (“Thus, as presently
10 pled, Plaintiffs’ complaint is deficient in alleging antitrust injury”). Specifically, the Court held
11 that Plaintiffs’ allegations of antitrust injury were “deficient” because they had not alleged (1) that
12 they had ever purchased a license from Defendants or intended to do so or (2) that the litigation
13 costs that they had incurred were caused by Defendants’ alleged aggregation of patents. The SAC
14 suffers from the same defects. Intel still has not alleged that it has purchased a license or is likely
15 to in the future, and it still fails to allege that Defendants have eliminated all, most, or even an
16 important subset of the substitutes available in each market. Thus, the requisite causal connection
17 between Defendants’ alleged “aggregation” scheme and Intel’s litigation costs is still missing.

18 Section 1. Instead of showing that the SAC has cured any of the deficiencies with the
19 FAC’s Sherman Act Section 1 allegations, the Opposition again argues that this Court got it
20 wrong. Specifically, Intel argues that it need not allege that “each defendant intended to harm
21 competition.” *Opp.* at 35:15-16. But this flatly contradicts this Court’s order (2nd Order at 27
22 n.10) and settled Ninth Circuit precedent. It also contradicts Intel’s own theory, which Intel now
23 “clarifies” is that “each ‘PAE knew Fortress would aggregate the PAE’s patents with another
24 PAE’s patents in the same market,’” (*Opp.* at 33:25-27 (quoting 2nd Order at 11 n.6)), or in other
25 words, that “each of the Defendants entered into separate agreements with Fortress with a
26 common objective with Fortress to eliminate competition.” *Opp.* at 34:1-3 (emphasis added).
27 Even setting this inconsistency aside, Intel’s assertion remains as conclusory as ever. Intel
28 continues to rely solely on the bilateral commercial agreements that this Court has already agreed

1 are “consistent with ‘rational, legal business behavior,’” 1st Order at 28:23-24, and the SAC still
2 contains no evidentiary facts demonstrating that Fortress and any other Defendant had a “common
3 objective” to aggregate patents or do anything anticompetitive.

4 Section 7. As the Motion demonstrated, the essence of a Clayton Act Section 7 violation is
5 that the acquisition at issue has given the defendant an undue percentage share of the market. The
6 Opposition, however, does not dispute that the SAC contains no allegations regarding Defendants’
7 alleged market share at all or market concentration. The Opposition cites no authority holding that
8 a plaintiff can escape its burden of pleading the basic elements of a Section 7 claim by relying on a
9 direct evidence theory (particularly when that theory, too, is pled in conclusory fashion). Intel also
10 does not dispute that, for many of the alleged markets, there has been no alleged aggregation since
11 all of the supposedly aggregated patents were previously owned by the same entity.

12 UCL. Finally, Intel’s California UCL claim, which is predicated on the same flawed
13 allegations as its federal claims, must be stricken because it necessarily arises from protected
14 activity under the anti-SLAPP law. The Motion cited on-point California authority holding that
15 where, as here, the plaintiff would not have suffered damages absent the defendants’ protected
16 petitioning conduct, the “arising from” prong of the anti-SLAPP test is satisfied. The Opposition
17 just ignores this authority. Accordingly, Defendants are statutorily entitled to attorneys’ fees.

18 **II. INTEL’S REDEFINED MARKETS ARE STILL NOT PLAUSIBLY STATED**

19 Intel claims it has cured the “facially overbroad” (2nd Order at 17:4-19:14) markets that
20 this Court previously dismissed by redefining them “based on specific functions within technical
21 fields” (Opp. at 2:15-17). But these redefined markets remain non-cognizable for several reasons.

22 First, Intel still fails to allege that the purported “substitutes” within the redefined markets
23 are economically interchangeable. As the Motion demonstrated, these supposedly “narrower”
24 markets still contain patents that on their face relate to different technologies and functionalities.
25 Mot. at 10:5-13:18. For example, Intel does not explain why consumers would treat a patent
26 covering a “suffocation prevention system” as interchangeable with one covering an “exercise
27 monitoring system.” *Id.* at 10:20-23. Intel also does not explain why consumers would treat a
28 patent directed at establishing virtual cellular networks as a substitute for a patent focused on

1 allowing multiple phones to connect to a “hands free car kit” via Bluetooth or Wi-Fi. *Id.* at 11:17-
2 23. These are just some of the Motion’s examples that Intel ignores. *See also id.* at 12:1-13:18.

3 Intel objects that Defendants’ arguments rely on “facts outside the SAC,” *Opp.* at 15:19-
4 20, but they do not. Defendants are not asking this Court to make any factual findings or
5 inferences. Defendants’ Motion simply relied on Intel’s own description of the patents and the
6 plain text of the patents themselves, neither of which are “outside the SAC,” to highlight the
7 conclusory nature and implausibility of Intel’s allegations that the patents are interchangeable. *See*
8 *Mot.* at 13:2-8. Indeed, Intel does not dispute that the patents are incorporated by reference into
9 the SAC (in addition to being a proper subject of judicial notice). *See GeoVector Corp. v.*
10 *Samsung Elecs. Co.*, 234 F. Supp. 3d 1009, 1016 n.2 (N.D. Cal. 2017); *RJN* at 1:11-25, 5:18-24.
11 Regardless, it is Intel’s burden to plead facts plausibly demonstrating that the alleged patents in
12 each market are economically interchangeable. It has failed to do so.

13 Second, Intel’s alleged markets are also non-cognizable because they expressly contain
14 both “substitutes” and “complements” even though “[g]rouping complementary goods into the
15 same market is economic nonsense.” *Mot.* at 14:19-15:2 (quoting 2B Areeda & Hovenkamp,
16 Antitrust Law ¶ 565(a) (5th ed. 2020)). Indeed, instead of “narrowing” the alleged markets in any
17 meaningful sense, all Intel has done is relabel some of the patents as “complements” instead of
18 “substitutes” while continuing to insist that these “complement” patents are still part of the alleged
19 “market.” *Opp.* at 15:7-18 (explaining that the alleged “substitutes” “include only those that
20 address the more narrowly-defined functionality” whereas the other patents have been reclassified
21 as “complements.”).¹ This allows Intel to artificially inflate the number of patents that Defendants
22 have supposedly aggregated in each market. To take just two examples, while Intel alleges
23 Defendants have aggregated seven patents in the “Preventing Stalls for Cache Misses” market,
24 only two of these patents are alleged “substitutes” (one of which is expired). *Mot.* at 23:8-11.

26 ¹ Compare FAC ¶ 180, with SAC ¶¶ 225-29, and SAC Ex. A at 4-5 (swapping the ’999 and ’877
27 patents from substitutes to complements); compare FAC ¶ 213, with SAC ¶¶ 255-57, and SAC Ex.
28 A at 6 (doing the same for the ’641 patent); compare FAC ¶ 236, with SAC ¶¶ 285, 290-91, and
SAC Ex. A at 8 (doing the same for the ’850 patent); compare FAC ¶ 252, with SAC ¶¶ 320, 337-
40, and SAC Ex. A at 11 (doing the same for the ’033 and ’532 patents).

1 Similarly, only three of the eight patents in the alleged “Generating Alerts Based on Blood
2 Oxygen Level” market are supposedly substitutes (all of which have expired), and the remaining
3 five patents do not even mention the word “oxygen” at all. Mot. at 10:6-11.

4 In other words, Intel is trying to have it both ways. It claims to have “narrowed” each
5 market definition to a specific technological function while also including “complementary”
6 patents that do not fit the supposedly narrower definition. This renders the markets legally non-
7 cognizable. As this Court explained, “[t]he outer boundaries of a product market are determined
8 by the reasonable interchangeability of use or the cross-elasticity of demand between the product
9 itself and substitutes for it.” *Id.* at 10:11-15 (quoting 2nd Order at 15:27-16:1). Complementary
10 goods, like car engines and radiators for example, are “not reasonably interchangeable for the
11 same purpose,” nor would they exhibit cross-elasticity of demand. *Id.* at 14:19-15:2 (quoting
12 *Golden Gate Pharm. v. Pfizer*, 433 F. App’x 598, 598-99 (9th Cir. 2011)).²

13 Finally, Intel’s redefined markets are non-cognizable because it has still failed to address
14 what other substitutes are in these “markets,” even though it is required to do so. Mot. at 13:19-
15 14:9 (citing cases). For example, Intel does not dispute there are at least 219 patents relating to
16 prevention of cache stalls, yet it only identifies two alleged substitutes within the so-called
17 “Preventing Stalls for Cache Misses” market. *Id.* at 13:24-14:1. It is thus unclear from the SAC
18 what other patents are included in this market and on what basis. This is especially true once one
19 adds the potentially countless “complements” that could be included in each market. The SAC
20 alleges no facts showing which complements are included and why. As such, the redefined
21 markets are not cognizable because their contours are impossible to discern. Mot. at 14:1-9.

22 Intel nonetheless argues that its alleged market definitions are sufficient to “put Defendants
23 on notice of the allegations against them, and the relevant markets in which anticompetitive effects
24 occur.” Opp. at 14:4-9 (citing *United States v. LSL Biotechnologies*, 379 F.3d 672, 699 (9th Cir.

25
26 ² Notably, Intel itself cannot seem to keep straight which patents are supposedly complements
27 versus substitutes. For example, according to Intel, the SAC “alleg[es] in detail how ’983, ’687
28 and ’850 patents are substitutes,” Opp. at 16:8-9, yet the ’850 patent was supposedly re-
categorized as a complement patent in the SAC. Compare FAC ¶ 236, with SAC ¶¶ 285, 290-91,
and SAC Ex. A at 8. Additionally, the ’648 Patent is sometimes claimed as a substitute patent and
sometimes as a complement patent. Compare SAC ¶¶ 426-27, with SAC Ex. A at 16.

2004)). But Intel’s reliance on *LSL Biotechnologies* is highly misleading. To begin with, Intel is relying on the dissent in that case. See *LSL Biotechnologies*, 379 F.3d at 699 (Aldisert, J., dissenting). This is not the first time it has cited the dissent from *LSL Biotechnologies* without acknowledging it. See Dkt. 216 at 1 (Plaintiffs’ Notice of Errata). Even worse, the dissent in *LSL Biotechnologies* was applying the standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which the Supreme Court “specifically abrogated” in *Twombly*. See *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). After *Twombly*, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Id.* (emphasis added) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Indeed, Intel repeatedly invokes the abrogated *Conley* standard throughout its brief. Opp. at 12:17-23, 14:2-9, 26:26-27:9.³ Regardless, the SAC fails to give Defendants “notice” of the alleged markets because, as explained above, the boundaries of these “markets” are entirely unclear.

III. INTEL FAILS TO ALLEGE FACTS SHOWING MARKET POWER

As the Motion demonstrated, Intel’s direct evidence theory of market power fails because (1) Intel has not cured any of the six deficiencies the Court previously identified, and (2) Intel has not alleged facts showing reduced output. Nothing in the Opposition demonstrates otherwise.

A. Intel Fails To Allege Facts Showing Aggregation Of “Crown Jewel” Patents

Instead of arguing that the SAC has added any of the necessary factual allegations that this Court held were missing from both the Complaint and FAC, Intel argues that these allegations are not required. Most notably, Intel admits that, despite this Court’s repeated instructions, Intel has not alleged any facts showing that “the aggregated patents in the relevant markets ‘represent the ‘crown jewels’ of the field’” as opposed to “just a small portion of a large field of substitutes.” Opp. at 26:17-19 (quoting 2nd Order at 25:12-16); see also 1st Order at 16:7-11, 17:5-6. Intel protests that, “under notice pleading, [it is] not required to allege” such facts because its allegations of “supracompetitive royalties themselves” constitute sufficient evidence of anticompetitive effects. Opp. at 26:26-27:16 (citing, *inter alia*, the dissent in *LSL*

³ Intel relies on the same misleading passage from *LSL Biotechnologies* three times in the Opposition. See Opp. at 12:20-23, 14:6-9, 27:6-9.

1 *Biotechnologies*, 379 F.3d at 699).

2 But this Court already considered and rejected these exact arguments. *See* Mot. at 29 n.25.
3 As the Court previously explained, the allegations of supracompetitive prices (which are
4 conclusory in any event as explained further below) are insufficient because, even under a “direct
5 evidence” theory, Intel “must still show that the supracompetitive pricing is due to the aggregation
6 of patent substitutes.” 2nd Order at 25, n.8 (emphasis added). Intel cannot make such a showing
7 absent any allegations regarding “the number of patents Defendants hold” relative to the market as
8 a whole or the “‘quality’ of those patents.” *Id.*; *see also* Mot. at 24:6-12.

9 Intel relies on *Bio-Rad Lab ’ys, Inc. v. 10X Genomics, Inc.*, 483 F. Supp. 3d 38 (D. Mass.
10 2020), but there, the defendant/counter-claimant did allege that the plaintiff’s patents constituted
11 the crown jewels because “there [were] no reasonable substitutes” in light of the fact that the
12 “available technological alternatives [were] inferior.” *Id.* at 56-57. This is the exact allegation
13 that this Court has repeatedly held is missing here. *See* 2nd Order at 25:12-16 (“The Court has no
14 idea whether these five patents represent the “crown jewels” of the field or just a small portion of a
15 large field of substitutes.”); 1st Order at 16:7-11 (“Plaintiffs do not give any concrete example
16 where Fortress and its PAEs have aggregated patents on a specific technology such that an alleged
17 infringer is essentially deprived of substitutes.”). In contrast to *Bio-Rad*, the SAC expressly
18 admits that each of the “markets” contain patents held by other entities besides Defendants. Mot.
19 at 24 n.19 (citing SAC ¶¶ 149, 185, 213, 249, 284, 304, 358, 391, and 415). And Intel does not
20 dispute that Defendants, at best, only own a small fraction of the potential number of patents
21 within these “markets” given their broad scope. *See* Mot. at 13:24-14:1; *id.* at 24:13-21.

22 Finally, Intel argues that “the size of Defendants’ demands show that Defendants regard
23 [their] patents as particularly important.” Opp. at 28:5-11. The Motion, however, cited multiple
24 authorities (which the Opposition ignores) holding that a defendant’s claims about the strength of
25 its patents cannot establish market power. Mot. at 25:1-10. Rather, Intel must allege facts
26 showing that Defendants have aggregated patents of such importance that there are no meaningful
27 alternatives available. *Id.* Intel has not—and indeed cannot—allege this because it is arguing the
28 exact opposite in the underlying patent litigations—that VLSI’s patents are worthless and that

1 [REDACTED]. Mot. at 25:11-24. In sum, the SAC does not allege any new facts
2 to address what this Court has repeatedly held is a core deficiency. Instead, it is essentially just an
3 “improper request[] for reconsideration” that has no merit in any event. *Gray v. Ocwen Mortg.*
4 *Servicing, Inc.*, No. 18-CV-01864-JD, 2020 WL 1503688, at *1 (N.D. Cal. Mar. 30, 2020)
5 (granting dismissal with prejudice), *aff’d*, 840 F. App’x 185 (9th Cir. 2021).⁴

6 **B. Intel Fails To Cure The Other Five Deficiencies Identified By The Court**

7 Beyond the above pleading problems, the SAC also fails to cure any of the five other
8 deficiencies the Court identified with respect to Intel’s direct evidence theory.

9 *First, Intel’s allegations of “supracompetitive royalties” are conclusory.* Intel attempts to
10 deflect from the fact that it still has not identified a single royalty or settlement that anyone has
11 ever paid to license Defendants’ patents (2nd Order at 22:11-18) by citing the alleged (and, in any
12 case, unremarkable) revenue of just one Defendant (“Uniloc Luxembourg”) of \$22 million over a
13 two-year period. Opp. at 18:1-13. Crucially, the SAC does not allege that Uniloc Luxembourg
14 has ever sued Intel or even approached it about licensing. SAC ¶¶ 103-120. Moreover, Intel does
15 not dispute that it presented these alleged figures to the Court in connection with the motion to
16 dismiss the FAC, Mot. at 16:11-13 (citing Dkt. 223), nor does it explain how these same figures
17 and argument warrant a different result now. As the Motion demonstrated, the SAC fails to allege
18 what portion (if any) of these total revenues were attributable to the patents at issue. *Id.* at 16:15-
19 21. The SAC also fails to compare these alleged revenues to Uniloc Luxembourg’s pre-
20 aggregation earnings or account for its costs, both of which are needed to determine whether these
21 revenues were somehow “supracompetitive.” *Id.* at 16:21-17:4. Intel just ignores these problems.

22 Intel also argues (as it has before) that it should not be required to identify actual royalty
23 rates or settlement amounts because this information is “in the hands of Defendants.” Opp. at
24 19:16-18. But this Court has already held that Intel’s inability to access this information does not

25 _____
26 ⁴ See also *Loos v. Immersion Corp.*, 762 F.3d 880, 890–91 (9th Cir. 2014) (affirming dismissal
27 with prejudice where the “district court gave Plaintiff a detailed explanation of why his original
28 theory [] was deficient” but Plaintiff “essentially re-pled the same facts and legal theories.”)
(citation omitted); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009)
(Plaintiffs’ “fail[ure] to correct these deficiencies in its Second Amended Complaint is ‘a strong
indication that the plaintiffs have no additional facts to plead.’”) (citation omitted).

1 “exempt [it] from the specificity requirements of *Twombly* and *Iqbal*.” 2nd Order at 24:15-18.
2 Citing no authority, Intel asks the Court to draw a negative inference from Defendants’ successful
3 opposition to Intel’s attempt to unseal certain information in the underlying infringement cases
4 despite the fact that two of the presiding judges concluded that this information was irrelevant to
5 the antitrust claims. Mot. at 21:15-20.⁵ Moreover, the only information that Intel has succeeded
6 in unsealing (Opp. at 21:5-8) is another irrelevant damages demand—not an actual royalty rate or
7 settlement amount. SAC ¶ 274. The Court should thus reject Intel’s speculation that unidentified
8 sealed records in other cases would somehow resuscitate the legally deficient claims in this case.

9 ***Second, non-assertion by prior owners is irrelevant.*** According to Intel, the SAC now
10 explains how the failure of the prior owners demonstrates that these patents had little value prior to
11 aggregation. Opp. at 21:26-22:17. But Intel does not dispute that it is bound by its prior
12 allegation that these prior owners faced “competitive constraints” that Defendants allegedly do
13 not. Mot. at 17:5-18:14; 2nd Order at 24:21-23 (citing FAC ¶ 49). These include, for example,
14 the risk that patent assertion could endanger “prospects for future sales,” “jeopardize[]” access to
15 “essential components,” prevent participation in “industry initiatives,” or provoke countersuits
16 from behemoths like Apple and Intel. FAC ¶ 49; 2nd Order at 2:25-3:11.

17 Moreover, the Opposition also ignores the numerous other “obvious alternative
18 explanations” for why a patent owner might choose to assert a patent when the prior owner did not
19 (especially when those prior owners were huge technology companies with tens of thousands of
20 patents, very few of which they have ever enforced). Mot. at 18:3-14. To take just two examples,
21 the patents may have fallen outside the prior owner’s core area of business, or subsequent
22 technical developments may have made the patents more valuable. *Id.* (listing obvious alternative
23 explanations). Intel claims that such “alternative explanations” are not relevant at the motion to
24 dismiss stage, Opp. at 23:26-24:2, but the Ninth Circuit has repeatedly held otherwise. *See, e.g.,*
25 *Somers*, 729 F.3d at 965 (affirming dismissal of antitrust claim where there were “‘obvious
26 alternative explanation[s]’ for [Apple’s] music pricing”); *In re Century Aluminum Co. Sec. Litig.*,

27
28 ⁵ Also, the mere fact that the other judges did not reach the issue of relevance does not somehow support Intel’s request for an adverse inference. Opp. at 20:19-22.

1 729 F.3d 1104, 1108 (9th Cir. 2013) (“[P]laintiffs cannot offer allegations that are ‘merely
2 consistent with’ their favored explanation. . . . Something more is needed, such as facts tending to
3 exclude the possibility that the alternative explanation is true.”) (citing *Iqbal* and *Twombly*).

4 Given these alternative explanations, Intel’s allegations are nothing more than pure speculation.

5 ***Third, what prior owners charged for different patents is irrelevant.*** As the Motion
6 demonstrated, the SAC continues to rely on many of the same apples-to-oranges comparisons
7 between Defendants’ alleged damages demands and what other patent holders have charged for
8 different patents. Mot. at 18:15-19:11. Intel attempts to deflect from this by pointing to the
9 SAC’s supposedly “new” allegations regarding the value (or lack thereof) that prior owners placed
10 on purported “substitute or complementary patents.” Opp. at 24:4-11. But these allegations fare
11 no better. As noted above, complements are wholly irrelevant because there is no reason to expect
12 complementary products (such as different auto parts) to have the same or similar prices. Mot. at
13 14:17-15:5. Similarly, as noted above, the SAC fails to allege that any of the alleged “substitutes”
14 are economically interchangeable or that they exhibit cross-elasticity of demand. *Id.* at 10:11-
15 11:7. More fundamentally, Intel continues to ignore the Ninth Circuit’s admonition that courts
16 should not infer that royalties are “anticompetitive” just because they are not “in line with the rates
17 other companies charge for their own patent portfolios.” *FTC v. Qualcomm Inc.*, 969 F.3d 974,
18 999 (9th Cir. 2020). That is exactly what Intel is asking this Court to do.

19 ***Fourth, damages demands have little probative value.*** The SAC fails to allege facts
20 showing that Defendants’ “demands” are anything more than “of limited probative value,” as this
21 Court previously ruled. 2nd Order at 25:3-6. A litigation “demand” is not a market price. Intel
22 (like the SAC) ignores that enforcing patents entails huge risks and costs. Mot. at 20:2-5. Patent
23 holders must spend significant resources litigating their claims and risk recovering nothing if they
24 lose. It thus makes no sense to allege that a litigation demand is direct evidence of market power.⁶

25
26 ⁶ The sole authority that Intel cites for its position is an FTC order. Opp. at 18:14-21 (quoting *In*
27 *re Union Oil Co. of Calif.*, 138 F.T.C. 1 (July 7, 2004)). But the actual quote appears to come
28 from a single paragraph of a more than 500-page proposed order filed by Complaint’s Counsel in
that case. See *In re Union Oil Co. of Calif.*, 2005 WL 906396, at *282 (F.T.C. Mar. 9, 2005).
There is no indication the FTC ever entered this order, and, even if it had, it would not bind this
court. See *Godo Kaisha IP Bridge 1 v. TCL Commc’n Tech. Holdings Ltd.*, No. CV 15-634-SLR-

1 Intel repeats its allegation that “damages demands ‘reflect the patent holder’s good faith
2 valuation of its patent in the market.’” Opp. at 25:4-9 (citing SAC ¶ 11). But Intel cannot
3 plausibly allege that these demands reflect the true market price of the patents given Intel’s flatly
4 contradictory contention—both in the SAC and in the underlying patent litigations—that
5 Defendants’ patents are “weak” and their infringement claims are “meritless.”⁷ Mot. at 3:27-4:3,
6 19:23-26. Moreover, as noted above, what Defendants claim about the value of their patents is
7 irrelevant for purposes of a market power analysis. Intel points to the jury award that VLSI
8 recently obtained against Intel as “a prime example of the relationship between a litigation demand
9 and an award of reasonable royalties.” Opp. at 25:15-20. But as the Motion demonstrated, and
10 the Opposition ignores, the SAC does not allege that the patents at issue in that case were part of
11 Defendants’ alleged “aggregation” scheme. Mot. at 22:5-14. Thus, this verdict just shows that the
12 inference that Intel is asking the Court to draw—*i.e.*, that Defendants’ large damages demands can
13 only be explained by “aggregation”—does not follow. *Id.* at 22:12-21.

14 Finally, even if damages demands in litigation had any relevance (and they do not), the
15 SAC’s characterization of Defendants’ damages demands are misleading. Intel does not dispute
16 that, like the FAC, the SAC still relies on many of the same flawed comparisons between a
17 “demand made for one group of patents with a later demand made for a different group of
18 patents.” Mot. at 20:8-11 (quoting 2nd Order at 26:11-14). [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED].

24
25 SRF, 2017 WL 750700, at *7 (D. Del. Feb. 27, 2017), *recommendation adopted*, 2017 WL
1055958 (D. Del. Mar. 20, 2017).

26 ⁷ Intel argues that there is no contradiction because the Court has “already rejected the argument”
27 that aggregating “weak patents” cannot harm competition. Opp. at 22:9-16. But the issue is not
28 whether aggregating “weak” patents is anticompetitive as a general matter. It is whether Intel’s
allegation that Defendants’ patents are “weak” contradicts Intel’s allegation that Defendants’
damages demands reflect the true market value of the patents, which it plainly does.

1 *Fifth, there is no alleged connection between alleged supracompetitive prices and*
2 *aggregation.* Finally, the SAC still does not plausibly allege that Defendants’ alleged damages
3 demands have anything to do with aggregation. As repeatedly noted, the damages in each of the
4 underlying infringement cases will be determined solely by the patents-in-suit. Mot. at 22:2-14.
5 There is no way for any Defendant to leverage patents held by a third party (or its own patents that
6 are not at issue) to seek higher damages. *Id.* Intel does not attempt to argue otherwise. Indeed, its
7 own proffered authority explains that “[a]ny evidence unrelated to the claimed invention does not
8 support compensation for infringement.” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869
9 (Fed. Cir. 2010) (emphasis added). In short, the basic premise of Intel’s theory is illogical.

10 Beyond that, Intel does not dispute that the alleged aggregation in this case is minimal. As
11 the Motion pointed out, for several of the markets, the alleged aggregation consists of the
12 acquisition of a single substitute patent. Mot. at 22:22-23:6. For others, Defendants allegedly
13 control just two substitute patents total, one of which has now expired. *Id.* at 23:7-12. Finally, as
14 to VLSI (which is the only Defendant who is alleged to have ever sued Intel), there has been no
15 aggregation at all because VLSI allegedly acquired all of its patents from a single entity, which
16 shows that, if anything, there has been disaggregation. *Id.* at 23:13-17.

17 The Opposition largely ignores all of this. Instead, Intel focuses solely on the Network-
18 based Voice Messaging “market,” Opp. at 25:21-26:4, which purportedly includes patents from
19 Uniloc 2017, Seven Networks, and INVT—none of which are alleged to have sued or threatened
20 Intel, the sole remaining plaintiff in this case. Regardless, Intel claims that the addition of a single
21 substitute (the ’252 patent) in this “market” gave Defendants market power as demonstrated by the
22 fact that the prior owner never asserted this patent. But that inference is not plausible for all of the
23 reasons explained above, and it is especially implausible given that Intel does not dispute that a
24 simple word search for patents reading on “Network-based Voice-Messaging” reveals that 1,639
25 patents have issued since 2000 with claims that fit this description. Mot. at 24:13-21 (citing RJN
26 at 5). Intel also highlights the alleged acquisition of the ’579 patent in this “market,” Opp. at 26:4-
27 6, but that patent is an alleged “complement” (not a “substitute”), SAC Ex. A at 2, so it could not
28 give rise to market power. Moreover, Intel’s myopic focus on the Network-based Voice

1 Messaging market ignores that the alleged aggregation in the other “markets” is similarly minimal.
2 The Court used the Network-based Voice Messaging market as a “representative example” of the
3 failings of the problems with the FAC’s alleged markets. 2nd Order at 23:6-8, 25:18. As the
4 Motion demonstrated, these same problems infect the SAC’s other alleged markets as well.

5 **C. Intel Fails To Allege Facts Of Reduced Output**

6 Intel already conceded that its allegations of “reduced output” are conclusory, and the
7 SAC’s allegations are the same as the FAC’s allegations. Dkt. 228 at 55:2-7 (Court: “Is there an
8 assertion here of an actual output diminution?” Intel: “Your Honor, I think the focus of the
9 specific allegations of anti-competitive effect are the supracompetitive royalties and
10 supracompetitive royalty demands. We do say that it reduces output, but we haven’t given you
11 specific examples of the reduced output.”).⁸ But conclusory allegations of “reduced output” fail as
12 a matter of law. See Mot. at 26:2-8 (citing *In re Webkinz Antitrust Litig.*, 695 F. Supp. 2d 987,
13 996, n.1 (N.D. Cal. 2010); *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1193-96 (S.D. Cal.
14 2002)). Having alleged no facts of “reduced output,” Intel instead argues that such allegations are
15 not required to plead a direct evidence theory (never explaining why, if they are not necessary, the
16 SAC includes conclusory allegations of reduced output in the first place). Opp. at 28:12-13; SAC
17 ¶¶ 9, 15, 44, 52, 162, 195, 232, 262, 293, 341, 374, 403, 431, 443-44, 448. As the Motion
18 demonstrated, however, this flatly contradicts Ninth Circuit precedent. Mot. at 26:12-21 (citing
19 *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997), *aff’d*, 525 U.S. 299 (1999),
20 *overruled on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012)). While Intel
21 argues that this binding precedent somehow does not apply, none of its arguments are availing.

22 First, Intel argues that *Forsyth* was somehow overturned by (1) a Northern District of
23 California case that the Ninth Circuit subsequently reversed on appeal and (2) an out-of-circuit
24 case from the District of Connecticut. Opp. at 28:12-19 (citing *In re Abbott Labs. Norvir Anti-Tr.*
25 *Litig.*, 562 F. Supp. 2d 1080, 1085–86 (N.D. Cal. 2008), *rev’d sub nom. John Doe 1 v. Abbott*
26 *Labs.*, 571 F.3d 930 (9th Cir. 2009) and *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 246
27

28 ⁸ Compare FAC ¶¶ 9-10, 40, 47, 141, 165, 198, 225, 243, 280, 307, 332, 354, 431, 435, with SAC
¶¶ 9, 15, 44, 52, 162, 195, 232, 262, 293, 341, 374, 403, 431, 443-44, 448.

(D. Conn. 2015)). Neither of these cases could have overruled binding Ninth Circuit law. Intel also ignores the many other cases from courts in this Circuit and throughout the country requiring allegations of reduced output. *See* Mot. at 26:12-27:6; n.22-23.⁹ These include a decision of this Court as well as a case decided just a few months ago, *i.e.*, well after Intel’s proffered authorities.

Second, Intel misrepresents the holding of *Forsyth*. On Intel’s telling, the direct evidence theory in *Forsyth* failed due to an insufficient showing of supracompetitive pricing. Opp. at 28:23-26. The Ninth Circuit’s opinion, however, makes clear that the plaintiffs had demonstrated inflated prices. They had not, however, shown reduced output. *Forsyth*, 114 F.3d at 1476 (“With no accompanying showing of restricted output, however, the plaintiffs have failed to present direct evidence of market power.”). Intel also argues that *Forsyth* involved a motion for summary judgment, but the Motion cited many cases dismissing antitrust complaints predicated on a direct evidence theory for failure to allege reduced output.¹⁰ Mot. at 26:12-27:6; n.22-23.

Third, Intel asks this Court to create a new exception to the reduced output pleading requirement for “patents and patent markets.” Opp. at 29:5-6. Intel’s sole authority for this argument—the Hovenkamp IP treatise—expressly acknowledges that the Ninth Circuit “requires evidence of reduced output” to show “monopoly power through direct evidence.” Hovenkamp, et al., *IP and Antitrust* § 4.03 (3d Ed., 2019 Supp. 2016) (citing *Forsyth*). In addition, Intel’s reasoning is flawed. Intel claims that reduced output is irrelevant in the patent context because “increased price cannot be accompanied by increased quality.” Opp. at 29:5-19. This is wrong. For example, subsequent technological developments could make a patent more valuable than it was before, *see* Dkt. 184 at 17:24-18:1, meaning more individuals would seek to license the patent

⁹ Citing, in addition to *Forsyth*: *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 887 (N.D. Cal. 2011); *Church & Dwight Co. v. Mayer Labs., Inc.*, 868 F. Supp. 2d 876, 898 (N.D. Cal. 2012) (Chen, J.), *order vacated on other grounds*, 2012 WL 1745592 (N.D. Cal. May 16, 2012); *Dominick v. Collectors Universe, Inc.*, No. 2:12-CV-04782-ODW, 2012 WL 6618616, at *4 (C.D. Cal. Dec. 18, 2012); *Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2013 WL 1501484, at *4 n.3 (N.D. Cal. Apr. 10, 2013); *Humana Inc. v. Mallinckrodt ARD LLC*, No. CV1906926DSFMRW, 2020 WL 3041309, at *6 (C.D. Cal. Mar. 9, 2020); *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2021 WL 879875, at *8 (N.D. Cal. Mar. 9, 2021); *BanxCorp v. Bankrate, Inc.*, 847 F. App’x 116, 120 (3d Cir. 2021).

¹⁰ *See Dominick*, 2012 WL 6618616, at *4; *Stewart*, 2013 WL 1501484, at *4 n.3; *Humana*, 2020 WL 3041309, at *6.

1 and its price would increase accordingly. In other words, there would be an increase in price, but
2 not an accompanying decrease in output. That is why allegations of reduced output are essential
3 even in the patent context—to show that the price increase is due to anticompetitive conduct, not
4 the inherent value of the patent. *See, e.g., Intellectual Ventures I LLC v. Cap. One Fin. Corp.*, No.
5 1:13-cv-00740, 2013 WL 6682981, at *6 (E.D. Va. Dec. 18, 2013) (requiring allegations of both
6 “supracompetitive prices and restricted output” in the context of a patent market).

7 Finally, Intel argues that it has adequately alleged a reduction of output. But this Court
8 held that the FAC’s allegations of reduced output “were largely conclusory,” Mot. at 25:26-26:2
9 (quoting 2nd Order at 23 n.7), and the SAC relies on the exact same conclusory allegations, *see*
10 *supra* n.8. Intel points to three paragraphs specifically: SAC ¶¶ 443, 451-52. Opp. at 29:22-30:6.
11 One of these is plucked directly from the failed FAC verbatim. *Compare* SAC ¶ 443, *with* FAC
12 ¶ 430. The other two repeat the same allegation from the FAC that Defendants’ enforcement
13 efforts have supposedly drained resources that Intel otherwise would have spent on “innovation.”
14 *Compare* SAC ¶¶ 451-52, *with* FAC ¶ 436. These allegations are not only conclusory, they also
15 have nothing to do with reduced output. To plead reduced output, a plaintiff must allege that the
16 defendant has “restrict[ed] its own output,” not that the defendant has caused other companies to
17 reduce their output. *Church*, 868 F. Supp. 2d at 896–97 (quoting *Rebel Oil*, 51 F.3d at 1434); *see*
18 *also Dominick*, 2012 WL 6618616, at *4; *Nationwide Power Sols. Inc. v. Eaton Elec. Inc.*, No.
19 SACV07883JVSFFMX, 2008 WL 11408997, at *8 (C.D. Cal. Oct. 10, 2008).¹¹ Intel’s conclusory
20 allegations of decreased output accordingly fail as a matter of law.

21 **IV. INTEL HAS NOT SUFFERED AN ANTITRUST INJURY**

22 As noted above, the Opposition wrongly claims that “[t]he Court already determined that
23 Plaintiffs’ allegations are sufficient to plead antitrust injury.” Opp. at 33:12-13 (citing 1st Order at
24 20). This is false. 1st Order at 21:2-6 (“Plaintiffs’ complaint is deficient in alleging antitrust
25 injury.”). As the Court explained, “Plaintiffs have not clearly alleged with sufficient specificity
26 that Defendants’ aggregation has in fact eliminated substitutes [] which has actually impacted
27 _____

28 ¹¹ As the Motion pointed out, if anything, the SAC has alleged that output has actually increased
post-aggregation. Mot. at 26 n.21. The Opposition fails to address this.

1 Plaintiffs.” *Id.* at 20:25-21:2 (emphasis added). The SAC suffers from this same defect. Mot. at
2 28:5-31:1.

3 First, to the extent Intel’s alleged injury consists of supposed “supracompetitive royalties,”
4 Opp. at 31:5-32:14, Intel does not dispute there is no allegation that it has ever paid any royalties
5 to any Defendant (“supracompetitive” or otherwise). Intel states that “Plaintiffs have ‘engaged in
6 licensing negotiations’ with Defendants,” *id.* at 31:9-13 (citing SAC ¶¶ 128, 130), but the only
7 “negotiations” alleged in the SAC occurred between Inventergy, INVT, and Apple, who is no
8 longer a plaintiff in this case. SAC ¶¶ 128, 130. There are no allegations that Intel has been
9 involved in any licensing negotiations with any Defendant, let alone any that would be likely to
10 result in a deal.¹²

11 Second, to the extent Intel’s alleged injury consists of the litigation costs that it has
12 incurred defending against VLSI’s infringement suits, Opp. at 32:16-33:21, Intel still has not
13 sufficiently alleged “that those lawsuits came about because of the elimination of substitutes.” 1st
14 Order at 21:2-6. Intel claims that it faces a “Hobson’s choice: pay supracompetitive royalties or
15 litigate.” Opp. at 31:14-15. As noted above, however, the SAC still fails to allege that Intel has
16 been “essentially deprived of substitutes” in any of the alleged markets, 1st Order at 16:7-11, or
17 that Defendants’ patents constitute the “crown jewels” of any alleged market, 2nd Order at 25:14-
18 17. Intel cannot plausibly allege that it faces a “Hobson’s choice” if there are other alternative
19 patented or non-patented technologies available to it [REDACTED]

20 [REDACTED]. Mot. at 25:11-24. The Motion cited law holding
21 that there can be no antitrust injury where a plaintiff fails to allege a lack of alternatives in the
22 market, but Intel ignores this fatal problem with the SAC. *See* Mot. at 29:7-30:9 (citing cases).

23 Intel claims that the SAC added “new” allegations “directly link[ing] Defendants’ patent
24

25 ¹² All of Intel’s cases involved plaintiffs that had actually purchased from defendants. *See* Opp. at
26 31:14-26; *Coal. For ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 499 (9th Cir.
27 2010) (organizational plaintiff composed of website owners who had purchased domain names
28 purchased advertising space from defendants); *In re Mercedes-Benz*, No. 99-4311(WHW), 2006
WL 2129100, at *21 (D.N.J. July 26, 2006) (class action lawsuit brought against Mercedes-Benz
by Mercedes-Benz owners). Consequently, these cases have no relevance here.

1 aggregation scheme to the injuries that Plaintiffs have suffered in the form of litigation costs.”
2 Opp. at 32:26-33:1 (citing SAC ¶¶ 149, 173, 204, 231, 245, 287, 312, 334, 356). But none of the
3 cited paragraphs say anything about “litigation costs,” and it appears that these citations refer to
4 the FAC instead.¹³ These allegations are thus in no sense “new,” nor does Intel explain how they
5 cure any of the numerous deficiencies with the injury allegations that the Motion identified.

6 Finally, Intel also accuses Defendants of “conflat[ing] the issue of injury with the separate
7 issue of whether Defendants have violated the antitrust laws in the first place.” Opp. at 32:1-2.
8 This is wrong. Even if Defendants had violated antitrust laws by aggregating substitute patents,
9 which they have not, Intel must allege that it has “actually [been] impacted” by such aggregation.
10 1st Order at 20:25-21:2. For the reasons explained above and in the Motion, Intel has not.¹⁴

11 Moreover, Intel cannot plausibly allege that the costs it has incurred in its litigation against
12 VLSI are somehow attributable to aggregation of substitute patents since the SAC does not allege
13 that VLSI (which is the only entity that has ever sued Intel) has ever aggregated any patents. As
14 the Motion pointed out and the Opposition does not dispute, VLSI acquired all of its patents from
15 a single entity (NXP).¹⁵ Mot. at 23:14-15 (citing SAC ¶¶ 74-78). Intel also cannot plausibly
16 allege that it has been injured by the other Defendants’ alleged aggregation of substitute patents
17 since the SAC never alleges that any of these Defendants have sued Intel or even threatened to do
18 so. The Opposition does not address this issue, and Apple’s recent voluntary dismissal from the
19 case makes it more glaring. Indeed, five out of the nine alleged “markets” now contain no
20 Defendants or patents that have ever been involved in a lawsuit against Intel, who is now the only
21
22
23

24 ¹³ For example, the Opposition states that paragraph 149 of the SAC states that Apple “‘has
25 refused to capitulate to exorbitant royalty demands’ for [certain] patents.” Opp. at 33:2-4. But the
quoted language actually appears in FAC ¶ 149.

26 ¹⁴ Intel accuses Defendants of making a “slippery slope” argument with respect to the SAC’s
27 allegations regarding Defendants’ supposed litigation demands, but the quote it attributes to
Defendants appears nowhere in the Motion. Opp. 32:2-7 (citing Mot. at 16, 30). Regardless, as
explained above, these allegations cannot possibly show direct evidence of market power.

28 ¹⁵ As noted above, VLSI’s purchase of patents from NXP actually resulted in disaggregation, by
dividing up a portion of NXP’s portfolio among two different entities.

1 remaining Plaintiff.¹⁶ See also 2nd Order at 15:2-12 (finding lack of Article III injury in alleged
2 markets involving no lawsuits against Plaintiffs). Regardless, even before Apple’s exit, the SAC’s
3 failure to allege antitrust injury was apparent, and it should thus be dismissed with prejudice.

4 **V. THE SAC STILL FAILS TO ALLEGE AN UNLAWFUL AGREEMENT**

5 According to Intel, “each of the Defendants entered into separate agreements with Fortress
6 with a common objective with Fortress to eliminate competition and reap the rewards from doing
7 so.” Opp. at 34:1-3. However, the SAC contains no “evidentiary facts” that Fortress and each
8 alleged PAE Defendant¹⁷ shared the “common objective” of aggregating patents under Fortress’s
9 control or any other “common objective” that could be considered anticompetitive. Mot. at 33:3-9
10 (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)).

11 While Intel asserts that “each PAE knew Fortress would aggregate the PAE’s patents with
12 another PAE’s patents in the same market” (Opp. at 33:25-26 (quoting 2nd Order at 11 n.6)), this
13 assertion, like the allegations in the SAC, is completely conclusory. Intel does not dispute that the
14 only alleged agreements identified in the SAC are the same “separate bilateral” contracts (Opp. at
15 34:3-5) between Fortress and each PAE Defendant that this Court has already held evince nothing
16 more than “rational, legal business behavior.” 1st Order at 28:22-24.¹⁸ The SAC does not allege
17 that these garden-variety loans and agreements say anything about aggregating substitute patents
18 or bringing infringement claims against Intel. 1st Order at 28:20-22 (“[T]here are still insufficient
19 allegations of an agreement by both Fortress and each PAE to aggregate weak patents.”). Nor
20 does the SAC allege evidentiary facts that any of the PAE Defendants have ever attempted to

21 _____
22 ¹⁶ These are the Network-based Voice Messaging; Remote Software Updates; Mobile Device-to-
23 Device Communication Through Network-Coupled Intermediary Device; Generating Alerts Based
24 on Blood Oxygen Level; Remote Enabling and Disabling of Software Components. SAC Ex. A.

25 ¹⁷ For consistency and purposes of this briefing only, Defendants use the term “PAE” in the same
26 way that the SAC employs it.

27 ¹⁸ Intel argues that routine business agreements can still violate antitrust laws (Opp. at 36:3-16),
28 but its cases—all of which Intel cited previously—only highlight the allegations missing here. See
ICANN, 611 F.3d at 503 (express contract terms effectively eliminating competitive bidding plus
“[allegations showing] intent to restrain competition”); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013)
(reverse payment settlement protecting patentee’s market); *United States v. Singer Mfg.*, 374 U.S.
174 (1963)) (coordinated dives on patent validity challenges to exclude competitor); *Hurricane
Shooters, LLC v. Emi Yoshi, Inc.*, 2010 WL 4983673 (M.D. Fla. Dec. 2, 2010) (aggregating over
ten patents covering a specific cup invention to obtain exorbitant licenses from competitors).

1 leverage each other's patents to obtain higher royalties. Indeed, there are still no evidentiary facts
2 pled that the PAE Defendants even knew of each other's existence.

3 Intel points to an alleged statement by Inventergy's CEO that a non-party to this suit
4 (Sonos) would face an "IP bloodbath" if it did not settle. Opp. at 35:23-27. But Intel does not
5 dispute that (1) this is just a recycled allegation from the two failed complaints and (2) the alleged
6 statement says nothing about substitute patents or other PAE Defendants or their patents. Mot. at
7 35:14-23. Intel also never alleges that any other PAE Defendant has ever sued or threatened to sue
8 Sonos, or that any such allegation has ever been made against Intel. Mot. at 35:19-21. Similarly,
9 Intel cannot rely on the bare allegation that Inventergy received "handsome consideration" for its
10 patents. As the Motion demonstrated, this allegation is immaterial and speculative because, as
11 Intel acknowledges, it does not know what this consideration actually was. Opp. at 37:24-27.¹⁹

12 Recognizing that it cannot plead evidentiary facts of a "common objective" among Fortress
13 and each PAE Defendant "to eliminate competition," Intel contends that it does not have to. Opp.
14 at 35:15-16 ("Plaintiffs thus need not plead that each defendant intended to harm competition
15 when they entered into the challenged agreements."). Instead, according to Intel, it just needs to
16 plead that the alleged agreements had the result of harming competition. *Id.* As Intel
17 acknowledges, its position—the same one it unsuccessfully advanced in its prior brief (*see* Dkt.
18 208 at 33:26-27)—flatly contradicts this Court's Order. Opp. at 34:6-9, 35:15-19; *see also* 2nd
19 Order at 27 n.10 ("Plaintiffs do not simply need to 'allege that the [relevant] defendant intended to
20 enter the agreement, and the agreement was anticompetitive.' . . . Rather, Plaintiffs must allege
21 that the agreement was intended to harm or restrain trade.") (emphasis added). Thus, this
22 argument is just another improper and untimely motion for reconsideration. *See Gray*, 2020 WL
23 1503688, at *1. Regardless, Intel's disguised request for reconsideration lacks merit.

24 The Ninth Circuit has consistently and repeatedly held that, "to state a Section 1 claim," a
25 plaintiff must plead that the defendants' alleged agreement or conspiracy was "intended to harm or
26

27 ¹⁹ Intel also claims the allegations that the PAE Defendants received both "favorable" terms and
28 that these terms were "severe" are not contradictory. Opp. at 37:3-23. But regardless of whether
this could be true as a theoretical matter, Intel must allege non-conclusory facts about what these
terms were. It cannot just speculate about these terms to fit its theory.

1 restrain trade.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (emphasis
2 added); *see also Kendall*, 518 F.3d at 1047. Indeed, Intel’s own proffered authority demonstrates
3 that intent is required. Intel repeatedly relies on *ICANN*, where the Ninth Circuit expressly held
4 that “restraint of trade claims under Section 1 do require the showing of a conspiracy whose
5 members intended to restrain trade.” 611 F.3d at 503. Intel simply ignores this binding precedent.

6 Instead, Intel relies on authorities—all but one of which predate the Ninth Circuit cases
7 cited above—that hold only that specific evidence of intent is not required where such intent can
8 be inferred from the obviously anticompetitive nature of the agreement or conduct itself.²⁰ *See*,
9 *e.g.*, *Helix Milling Co. v. Terminal Flour Mills Co.* 523 F.2d 1317, 1321 (9th Cir. 1975) (holding
10 that, in the “unusual factual context” before it, “[a] jury could find [] such anticompetitive intent”
11 because defendant’s conduct “would necessarily exclude [a competitor] from the market”); *United*
12 *States v. Griffith*, 334 U.S. 100, 108 (1948) (a “purpose” to restrain trade may be “chargeable” to a
13 defendant where this was a “necessary and direct consequence” of the agreement).²¹ In contrast,
14 where, as here, the alleged agreements consist of ordinary business arrangements (something this
15 Court has already expressly recognized, 1st Order at 28:22-24), no such inference of intent is
16 warranted. *See, e.g., Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795
17 F.3d 1124, 1130 (9th Cir. 2015) (“We cannot, however, infer an anticompetitive agreement when
18 factual allegations just as easily suggest rational, legal business behavior.”) (affirming dismissal)

19 ²⁰ The sole exception is a district court case: *PNY Techs., Inc. v. SanDisk Corp.*, No. 11-CV-
20 04689-WHO, 2014 WL 2987322 (N.D. Cal. July 2, 2014). But the court in that case incorrectly
21 held that the intent requirement only applies to Section 2 cases without addressing any of the
Ninth Circuit authorities cited above.

22 ²¹ The other authorities cited in the Opposition are equally inapposite. First, Intel cites *McLain v.*
23 *Real Est. Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), but that case addressed the scope of
24 Commerce Clause jurisdiction, not the requirements for pleading a Section 1 claim, and it also
25 involved an obviously anticompetitive “price-fixing” agreement. *Id.* at 232. Intel also cites
26 *California Dental Ass’n v. FTC*, 224 F.3d 942 (9th Cir. 2000), but that case was not about Section
27 1 at all. Rather, it analyzed Section 5 of the FTC and merely held that “good motives will not
28 validate an otherwise anticompetitive practice,” where “the point of the [practice] was clearly to
limit” commercial conduct. *Id.* at 948 (citing Hovenkamp, *Antitrust Law* ¶ 1506). Finally, *Times-*
Picayune Pub. Co. v. United States, 345 U.S. 594 (1953) and *Dunn v. Phoenix Newspapers, Inc.*,
735 F.2d 1184, 1189 (9th Cir. 1984) are of no help to Intel because, in both of those cases, the
court held that there was no Section 1 violation. *Times-Picayune*, 345 U.S. at 621; *Dunn*, 735
F.2d at 1190 (holding carriers “failed to prove damages”). Moreover, each of these cases predate
the more recent Ninth Circuit authority holding that intent is required thus belying Intel’s claim
that they somehow stand for the contrary proposition.

1 (internal quotation marks omitted); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)
2 (“[W]ithout that further circumstance pointing toward a meeting of the minds” that is necessary to
3 plead a Section 1 claim, “an account of a defendant’s commercial efforts stays in neutral
4 territory.”); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (“[A]n
5 exclusive distributorship, even with the knowledge that harm to competition will ensue, does not
6 create an inference that harm to competition is intended”) (affirming dismissal). In such cases, a
7 plaintiff must allege evidentiary facts demonstrating that the parties entered into the agreement
8 with an “intent to harm competition.” *Rutman Wine Co.*, 829 F.2d at 736; *see also* *Kelsey K. v.*
9 *NFL Enterprises, LLC*, 757 F. App’x 524, 526 (9th Cir. 2018) (“Kelsey failed to allege any facts
10 showing that the NFL Member Teams intended to harm or restrain trade.”) (affirming dismissal).
11 Such evidentiary facts are wholly absent here.²²

12 Finally, even if evidentiary facts of intent were not required as a matter of law, they are
13 required under Intel’s own proffered theory. The only way for Intel’s alleged “conspiracy” to
14 work is if each PAE Defendant intentionally sought to leverage the substitute patents held by the
15 other PAE Defendants to obtain inflated royalties. Otherwise there would be no way for the PAE
16 Defendants to “reap the rewards” of their supposed “common objective with Fortress to eliminate
17 competition.” Opp. at 34:1-3. The SAC, however, does not allege a single evidentiary fact
18 showing that this has ever occurred even though the alleged conspiracy dates back a half a decade
19 or more. Mot. at 36:7-13. For instance, there is no fact allegation that Uniloc ever tried to
20 leverage a VLSI patent, or vice versa. Moreover, Intel in particular cannot plausibly allege that it
21 has been the victim of such a conspiracy given that, as noted above, it has only been sued by one
22 Defendant (VLSI), and that Defendant is not even named in the SAC’s Section 1 count. It makes
23 no sense to allege that the Section 1 Defendants somehow conspired to aggregate patents and
24

25 ²² Intel also cites the out-of-circuit case of *Spectators’ Commc’n Network Inc. v. Colonial Country*
26 *Club*, 253 F.3d 215, 222 (5th Cir. 2001) for the proposition that is sufficient if only one party to an
27 agreement “intended an anticompetitive result.” Opp. at 35:2-19. *Spectators* says no such thing.
28 It held only that the mere fact that a “competitor lacks a direct interest in precluding competition”
is irrelevant where the competitor has been “enticed or coerced into knowingly curtailing
competition.” *Spectators*, 253 F.3d at 222 (emphasis added). Intel fails to allege any facts
demonstrating that any of PAE defendants “knowingly” curtailed competition.

bring suit against Intel given that none of these Defendants has ever done so despite the over half-decade long existence (according to Intel) of the purported conspiracy.²³

VI. THE SECTION 7 CLAIM FAILS AS A MATTER OF LAW BECAUSE INTEL FAILS TO PLEAD MARKET SHARE

In addition to the SAC's independent failures to plead cognizable markets, market power, or antitrust injury, Intel's Clayton Act Section 7 claim also necessarily fails as a matter of law because the SAC is devoid of any facts regarding market concentration or Defendants' market share, either before or after each of the challenged acquisitions.

Intel's primary response is that such allegations are not required in cases dealing with mergers or acquisitions that have already happened, and where the plaintiff is relying on a direct evidence theory. Opp. at 38:4-12. Even if Intel had adequately alleged direct evidence (which it has not), this is wrong. The Motion cited multiple authorities from this district dealing with consummated mergers in which the court still held that a defendant was required to plead facts of market share and concentration. Mot. at 36:24-38:24.²⁴ In *Synopsisys, Inc. v. ATopTech, Inc.*, the court held that allegations of "increased prices for consumers" post-merger were not sufficient to state a Section 7 claim where the plaintiff had "not alleged any facts" regarding "the market share attributable" to any of the acquired or acquiring parties "prior to [the] merger." 2015 WL 4719048, at *6 (N.D. Cal. Aug. 7, 2015). While Intel attempts to distinguish *Synopsisys*, Intel is advancing the exact same flawed theory, i.e., that it does not have to plead facts of market share or concentration because it has alleged that Defendants' royalty rates increased post-aggregation.

²³ Notably, Intel's first case that it voluntarily dismissed prior to adding Apple as a plaintiff did not name any of the current Section 1 Defendants except Fortress. *See Intel Corp. v. Fortress Investment Group LLC*, No. 5:19-cv-06856, Dkt. 1 (N.D. Cal. Oct. 21, 2019). Intel's Section 1 claim was limited to a purported agreement between Fortress and DSS (which this Court already dismissed with prejudice, 1st Order at 41:2-7). Intel's prior pleadings demonstrate that it knows full well it has no facts to show that the PAE Defendants, who are never alleged to have sued or threatened Intel, could plausibly be part of a "conspiracy" against it.

²⁴ *See, e.g., Golden Gate Pharm. Services, Inc. v. Pfizer, Inc.*, C-09-3854 MMC, 2009 WL 4723739, at *5 (N.D. Cal. Dec. 2, 2009) (dismissing a Section 7 claim against a consummated merger because there were no allegations about "number of suppliers" in the market); *Med Vets Inc. v. VIP Petcare Holdings, Inc.*, 18-CV-02054-MMC, 2019 WL 1767335, at *6 (N.D. Cal. Apr. 22, 2019) (doing the same because there were no allegations related to defendants' market share), *aff'd*, 811 Fed. Appx. 422 (9th Cir. 2020). The Opposition fails to address these authorities.

1 Opp. at 39:12-13 (“Plaintiffs have alleged how the royalties are supracompetitive as compared to
2 the pre-aggregation world.”). And even in the context of consummated mergers, the Supreme
3 Court has held that a plaintiff must show that competition has been “foreclosed in a substantial
4 share” of the market. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 595 (1957).

5 Intel fails to cite a single case where a Section 7 claim was allowed to proceed where there
6 were no factual allegations of market share as is the case here. Moreover, none of the cases that
7 Intel cites hold that such allegations are not required. See Opp. at 38:19-39:3. The opposite is
8 true. For example, in *Intellectual Ventures I LLC v. Cap. One Fin. Corp.*, the plaintiffs alleged
9 that the defendant owned “a 100 percent share of the relevant market.” 99 F. Supp. 3d 610, 625
10 (D. Md. 2015) (“Counterclaimants sufficiently have alleged a significant market share—the entire
11 market.”); see also *E. I. du Pont de Nemours & Co.*, 353 U.S. at 593–96 (allowing Section 7 claim
12 where “the record clearly shows . . . that [defendant] has a substantial share of the relevant
13 market”). Meanwhile, in *FTC v. Lab’y Corp. of Am.*, the court denied a preliminary injunction
14 against a prospective acquisition because the government failed to show it would violate Section
15 7. No. SACV 10-1873 AG MLGX, 2011 WL 3100372, at *21 (C.D. Cal. Feb. 22, 2011).

16 Finally and independently, Intel’s Section 7 claim fails because, for many of the “markets,”
17 there has been no alleged aggregation at all. Mot. at 37:7-17. For example, the Motion pointed
18 out that Uniloc 2017 is the only Section 7 Defendant who is alleged to own a substitute patent in
19 four of the alleged “markets,” but Uniloc 2017 allegedly acquired all of these patents from the
20 same entity (Uniloc Luxembourg). When there has been no increase in market concentration,
21 there can be no Section 7 violation. *Id.* The Opposition does not even address this argument.

22 **VII. INTEL’S UCL CLAIM MUST BE STRICKEN UNDER THE ANTI-SLAPP LAW**
23 **EVEN IF THIS COURT DISMISSES THE CLAIM**

24 The SAC’s UCL claim must be stricken under California’s Anti-SLAPP statute because
25 these claims (1) “arise[] from protected activity” and (2) fail as a matter of law. Mot. at 39:26-
26 40:7. As such, the Court must strike the UCL claim “even if it dismisses the underlying claim
27 without leave to amend, as a successful anti-SLAPP motion results in the award of fees.” *Gressett*
28 *v. Contra Costa Cty.*, No. C-12-3798 EMC, 2013 WL 2156278, at *33 (N.D. Cal. May 17, 2013).

1 The Motion set forth two independent reasons why Intel’s UCL claim satisfies the “arising
2 from” prong of the Anti-SLAPP test, one of which the Opposition just ignores. First, a claim
3 necessarily arises from “protected activity” where the activity “supplies a necessary element” of
4 that claim. Mot. at 39:27-40:1 (quoting *Wilson v. News Network, Inc.*, 7 Cal. 5th 871, 892
5 (2019)). Here, there is no dispute that Defendants’ infringement suits constitute “protected
6 activity” under California law. Mot. at 40:5-12. There is also no dispute that these suits supply a
7 “necessary element” of Intel’s UCL claim, *i.e.*, the “lost money or property” element. Mot. at
8 40:2-5 (quoting Cal. Bus. & Prof. Code § 17204). This because the only “lost money or property”
9 that Intel alleges are its “litigation costs” (SAC ¶ 467) from Defendants’ patent suits. The Motion
10 cited on-point law holding that the “arising from” prong is satisfied where, as here, the plaintiff
11 “would not have incurred any . . . damages” but for the “filing of the complaint.” Mot. at 40:9-12
12 (citing *Moss Bros. Toy v. Ruiz*, 27 Cal. App. 5th 424, 435 (2018)).

13 The Opposition never even addresses this point. Intel argues that this Court has already
14 found that its claims “arise[] from Defendants’ patent transfer scheme” when the Court held that
15 Intel’s suit was not covered by the *Noerr-Pennington* doctrine, which is grounded on First
16 Amendment principles. Opp. at 39:25-27. But the question of whether Intel’s suit is covered by
17 California’s Anti-SLAPP statute presents a separate and distinct legal question. Moreover, “the
18 protections afforded by the Anti-SLAPP statute are not coextensive with the categories of conduct
19 or speech protected by the First Amendment.” *Indus. Waste & Debris Box Serv., Inc. v. Murphy*,
20 4 Cal. App. 5th 1135, 1152 (2016). Thus, “courts determining whether conduct is protected under
21 the anti-SLAPP statute look not to First Amendment law,” but to the text of the statute. *See id.*

22 While the Court need not reach this issue, the “arising from” prong is also satisfied for a
23 second and independent reason: Intel is seeking to enjoin Defendants’ protected infringement
24 suits, which amounts to a prior restraint on Defendants’ protected activity. Mot. at 40:13-18
25 (citing *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 n.4 (2002)). According to
26 Intel, *Equilon* is distinguishable because that action for injunctive relief “expressly was based on”
27 the defendant’s petitioning conduct. Opp. at 40:7-10. But in so determining, the California
28 Supreme Court pointedly noted that the plaintiff “sought injunctive relief that expressly would

1 restrict” the defendant’s ability to pursue litigation. *Equilon*, 29 Cal. 4th at 67 n.4 (emphasis
2 added). Intel does not dispute that this is the exact relief that it is seeking here. Indeed, Intel
3 expressly admits the “relief [it] seek[s] is based on Defendants’ patent aggregation and assertion
4 scheme.” Opp. at 40:9-10 (emphasis added).

5 Finally, the second prong of the Anti-SLAPP test is satisfied because Intel’s UCL claim
6 fails as a matter of law for all the reasons that its federal antitrust claims fail. Mot. at 40:20-41:7.

7 **VIII. CONCLUSION**

8 This is Intel’s third bite at the apple, but it still has not cured the multiple independent
9 deficiencies the Court already found, and in many respects Intel did not even attempt to do so.
10 Instead, Intel has recycled old allegations, argued against the Court’s prior rulings (often using the
11 same case law it previously cited), and claimed this Court already ruled in its favor when that is
12 simply not true. The SAC should be dismissed with prejudice and Defendants’ motion to strike
13 should be granted. *See Zucco*, 552 F.3d at 1007 (affirming dismissal of SAC with prejudice
14 because “it was clear that the plaintiffs had made their best case and had been found wanting”).

15
16 Dated: July 8, 2021

Respectfully submitted,

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ECF ATTESTATION

I, Lucas S. Oxenford, am the ECF user whose ID and password are being used to file
DEFENDANTS’ JOINT REPLY IN SUPPORT OF JOINT MOTION TO DISMISS AND TO
STRIKE INTEL’S SECOND AMENDED COMPLAINT. I hereby attest that I received
authorization to insert the signatures indicated by a conformed signature (/s/) within this e-filed
document.

By: /s/ Lucas S. Oxenford